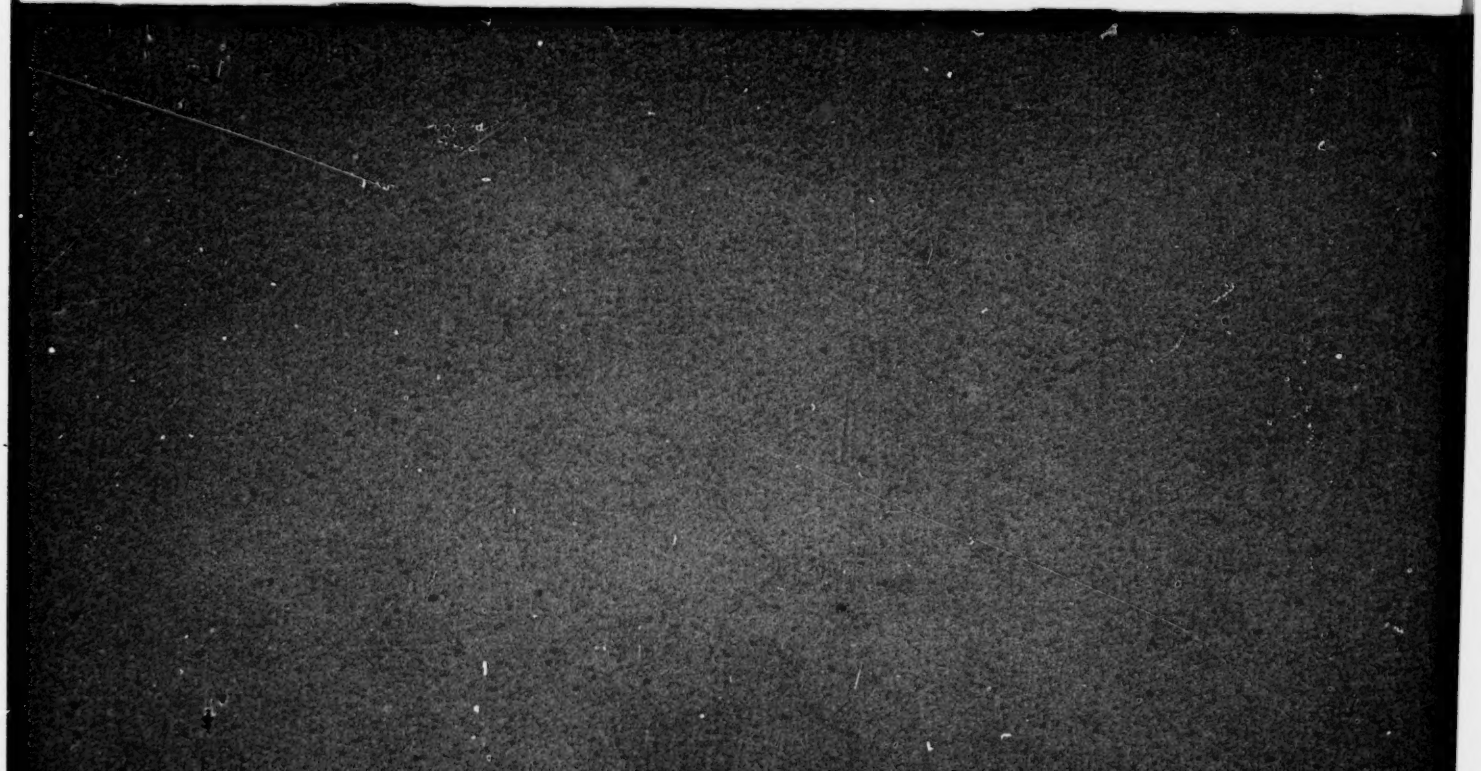

SUPREME COURT, U. S.

FILED

NOV 13 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-424

BOWMAN TRANSPORTATION, INC.,

Petitioner,

—v.—

HAROLD FRANKS and JOHNNIE LEE,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

JOHN R. MYER
Crosland, Myer & Rindskopf
2415 Nat'l Bank of Georgia Bldg.
34 Peachtree Street, N.W.
Atlanta, Georgia 30303

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
BARRY L. GOLDSTEIN
10 Columbus Circle, Suite 2030
New York, New York 10019

ELIZABETH R. RINDSKOPF
265 Church Street
New Haven, Connecticut 06510

Attorneys for Respondents

TABLE OF CONTENTS

PAGE

Questions Presented for Review 1

Statement of the Case 2

ARGUMENT

1. Class Back Pay Is Consistent With Rule 23 5
2. The Decision Below Does Not Offend the Policy of Encouraging Conciliation of Title VII Claims 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Alexander v. Gardner-Denver Co., 39 L.Ed.2d 147 (1974) 8, 9, 10

Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437 (5th Cir. 1974) 6, 7

Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973) 8

Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969) 5, 9

Bowe v. Colgate-Palmolive Co., 489 F.2d 896 (7th Cir. 1973) 5

Brady v. Bristol-Myers, Inc., 459 F.2d 621 (8th Cir. 1972) 10

Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), cert. denied 409 U.S. 982 (1972) 10

Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971) 10

PAGE

Dent v. St. Louis-San Francisco Railway Co., 406 F.2d 399 (5th Cir. 1969) 8

Eisen v. Carlisle & Jacquelin, 40 L.Ed.2d 732 (1974) 6

Gresham v. Chambers, —— F.2d ——, 8 EPD ¶9613 (2nd Cir. 1974) 10
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 9

Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973) 5, 7

Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) 6
Johnson v. Goodyear Tire & Rubber Co., 349 F. Supp. 3 (S.D. Tex. 1971) 6

Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974) .. 10

Macklin v. Spector Freight System, Inc., 478 F.2d 979 (D.C. Cir. 1973) 10
Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969) 8

Norman v. Missouri-Pacific Railroad Co., 497 F.2d 594 (8th Cir. 1974) 5

Oatis v. Crown-Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968) 9

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 6, 7, 8

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed 404 U.S. 1006 (1971) 5
Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D. N.C. 1970) 7

PAGE

Rosen v. Public Service Gas & Electric Co., 477 F.2d 90 (3rd Cir. 1973) 5, 8

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) 8

Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. denied 401 U.S. 948 (1971) 10

Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1972) 8

Tipler v. E. I. DuPont Co., 443 F.2d 125 (6th Cir. 1971) 8

United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973) 5

Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir. 1970), cert. denied 400 U.S. 911 (1970) 10

Young v. International Tel. & Tel. Co., 438 F.2d 757 (3rd Cir. 1971) 10

Statutes and Rules:

Federal Rules of Civil Procedure, Rule 23(b)(2) 1, 2, 4, 5, 6

Federal Rules of Civil Procedure, Rule 23(b)(3) 6

Federal Rules of Civil Procedure, Rule 23(d)(2) 7

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* ..... *passim*

42 U.S.C. §1981 ..... 1, 3, 10

Other Authorities:

Advisory Committee's Notes, 39 F.R.D. 69 (1966) 4, 5, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-424

BOWMAN TRANSPORTATION, INC.,

Petitioner,

—v.—

HAROLD FRANKS and JOHNNIE LEE,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Questions Presented for Review

1. Whether in a case held maintainable as a class action under Rule 23(b)(2), Fed.R.Civ.P., a court may award back pay to a class of black employees who have suffered economic injury due to their employer's policy of discrimination?

2. Whether the policy of providing an opportunity to conciliate employment discrimination claims prohibits an award of back pay in a class action brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981?

Statement of the Case

This class action was filed in the United States District Court for the Northern District of Georgia on May 5, 1971 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981. Respondent Franks (hereafter "plaintiff") alleged that Petitioner Bowman Transportation, Inc. (hereafter "Bowman"), a carrier of freight by truck, had engaged in across-the-board practices of employment discrimination on the basis of race in violation of the federal rights of plaintiff and other similarly situated black workers. Respondent Lee (hereafter "intervenor") intervened in the case and filed a similar class action complaint on July 21, 1971. Both plaintiff and intervenor had properly exhausted their administrative remedies before the Equal Employment Opportunities Commission ("EEOC") prior to filing suit.

After trial of the case, the district court held the action maintainable as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure, and defined the classes represented by plaintiff and intervenor. The court found that Petitioner Bowman had engaged in a comprehensive and tenacious program of racial discrimination infecting many aspects of its operations.[1] In addition, the court

[1] Specifically, it found that prior to 1968 Petitioner maintained completely segregated jobs and departments, with almost no black employees anywhere in the Company (A66-A67); that by August, 1971 (after suit was filed) Petitioner still had only a token few blacks in most job categories, and none at all in several of the more desirable positions (Atlanta terminal over-the-road (OTR) driver, mechanic, and office/clerical jobs) (A67); that Petitioner had a policy of refusing to allow transfers which effectively locked blacks into their few inferior jobs (A66, A70); and that blacks had been consistently relegated to the lower paying positions and earned considerably less than white employees (A67-A68). The court further found that Petitioner had followed an "unwritten policy" of refusing to consider black applicants for the high-paying OTR

found that plaintiff and intervenor had each been discriminated against as individuals (A74-A75, A78-A79).

The district court granted partial relief to intervenor (A82) but denied relief to plaintiff on jurisdictional grounds later reversed on appeal (A78, A27). On the class action aspect of the case, the court entered a limited prospective injunctive order enjoining discrimination and granting class members certain job rights (A85-A87). The district court rejected Respondents' claims for compensatory back pay on behalf of members of the class (A72-A73), as well as other measures of affirmative relief not pertinent here. The court based its back pay denial on the proposition that a class back pay award would bypass the EEOC administrative procedures required for individual plaintiffs by Title VII, 42 U.S.C. § 2000e-5(b), and that the Act's "emphasis on private settlement" would thereby be "thwarted" (A73).[2] It did not mention the claim under 42 U.S.C. § 1981.

On Respondents' appeal, the Court of Appeals concurred with all the district court's findings of discrimination and found further discrimination in several areas where the lower court had not found Petitioner in violation of law (A33-A37). In accordance with the principle that federal courts must broadly exercise their discretion to remedy the effects of past racial discrimination (A41-A42), the Court of Appeals also held that Respondents were entitled

---

job, which resulted in complete exclusion of blacks from that job throughout the Company until September, 1970, and as late as February, 1972 (one month before trial) at certain terminals (A69). The court specifically found that apparently qualified black applicants had applied for OTR positions and been discriminatorily rejected (A69).

[2] These are among the reasons asserted by the Petition for granting the writ.

to a number of measures of affirmative injunctive relief denied them below (A42-A55).

With respect to the class back pay issue framed by the Petition, the Court of Appeals reversed the denial of relief and rejected the district court's reasoning (A55-A58). It remanded for reconsideration with the instruction that "[t]he district court should devise an appropriate procedure for adjudicating the claims of non-named class members for back pay awards" (A57). The Court of Appeals opinion rejected the argument that either Title VII or Rule 23(b)(2) does not allow for class back pay awards. As to Title VII it held that,

> An EEOC complaint filed by the class representative allows an adequate opportunity for resolution of problems of the class through conciliation, . . . and opens the courthouse doors for the class. . . . [W]e see no basis for treating back pay as unique and requiring each class member to file his claim with the EEOC before asserting it in the courtroom. (A56)

As to Rule 23(b)(2), the Court of Appeals held class back pay proper since such relief is not in the nature of "damages" but part of the equitable remedy, and since in any event back pay was not the exclusive or predominant relief sought in the action, see Advisory Committee's Notes, 39 F.R.D. 69, 102 (1966) (A57).

Petitioner sought rehearing, which was denied on July 15, 1974 (A62).

ARGUMENT

1. Class Back Pay Is Consistent With Rule 23.

Petitioner asserts that the provisions of Rule 23, Fed. R.Civ.P., preclude an award of back pay to the class (Pet. 6). Neither the language of Rule 23, nor the intent of its authors support Petitioner's contention that compensatory back pay, unlike any other appropriate equitable remedy, should be unavailable in class actions. On the contrary, where the prerequisites of Rules 23(a) and (b)(2) are met, thus establishing a proper class action situation, it would thwart the whole purpose of the class action device as embodied in the 1966 Amendments to insist as Petitioner does that nothing more than "the individual claims of numerous class members" for back pay (Pet. 6) is involved. The framers of amended Rule 23(b)(2) specifically intended it to be applied to actions like this one, in which the remedy sought is not one that "relates exclusively or predominantly to money damages. . . . Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class," Advisory Committee's Notes, 39 F.R.D. 69, 102 (1966). Recognizing and often relying on the broadly equitable nature of relief in Title VII actions, the Courts of Appeals for at least five other Circuits[3] have

---

[3] *Rosen* v. *Public Service Gas & Electric Co.*, 477 F.2d 90, 95-96 (3rd Cir. 1973) (pension benefit payments); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-802 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969) and 489 F.2d 896 (7th Cir. 1973); *Norman* v. *Missouri-Pacific Railroad Co.*, 497 F.2d 594 (8th Cir. 1970), following *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354, 379-380 (8th Cir. 1973).

joined the Fifth Circuit[4] in uniformly holding class back pay available in appropriate Rule 23(b)(2) class actions like this one. No court of Appeals has held to the contrary.

Faced with the uniformity of on-point decisions, Petitioner strains to conjure up a conflict between the decision below and *Eisen* v. *Carlisle & Jacquelin*, 40 L.Ed.2d 732 (1974). But the *Eisen* holding is wholly consistent with the Court of Appeals decision in the instant case. *Eisen* discussed Rule 23 notice requirements only as they relate to class actions under subsection (b)(3), 40 L.Ed.2d at 748 n.14. The district court allowed the case at bar to proceed as a Rule 23(b)(2) class action (A72), and nothing about the nature of the case requires its transformation, contrary to the pleadings, proof, and decision of the trial court, into a 23(b)(3) case, see p. 5, *supra*. The difference is one of substance and not mere form. *Eisen* involved a class of over six million persons, most of them not readily identifiable, scattered around the globe, 40 L.Ed.2d at 742. In the instant case, the classes consist of slightly more than 200 individuals, all with a close nexus to the subject action and Petitioner's premises, and all of whom are specifically identified in the record (A72, Pet. 5 and n.1).

Eisen is inapposite for another reason. The Court's concern in *Eisen* was to protect absent members of the class. In this proceeding, no class member has to this

---

[4] The instant case is only one in a line of Fifth Circuit decisions authorizing back pay in Rule 23(b)(2) suits. See, *e.g.*, *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974), class action allowed 349 F. Supp. 3, 11-12 (S.D. Tex. 1971); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 217 n.4, 251-252, 257 (5th Cir. 1974); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 440 (5th Cir. 1974).

point been in any way prejudiced in, or deprived of his opportunity to present, his individual claim. The trial court chose not to require notice to individual class members before the initial trial. The court had already decided not to adjudicate any class members' individual claims at that trial. Rather, it heard and adjudicated only the legal issues of class-wide discrimination and the class members' legal right to the back pay remedy (A65-A73). The district court gave class members notice of that class-wide decision by posting at Company facilities and by mail to rejected job applicants (A86-A87). Class members can now be notified of the contrary appellate decision in the same or other suitable manner.

It will now be proper on remand, for the first time in this litigation, to proceed to examine the particular claims of class members (A57-A58). Those proceedings will determine class members' entitlement to back pay and other relief.[5] Within this carefully established framework, notice is properly given in this case after the initial liability trial but before the proceedings to determine individual claims. At that time class members may elect not to participate in such proceedings, to be separately represented, or to take such action as they deem fit. This procedure comports fully with the purpose and terms of Rule 23(d)(2) seeking to assure protection of class mem-

---

[5] The Fifth Circuit has so consistently endorsed this bifurcated trial procedure that district courts in the Circuit would now seem obligated to reserve adjudication of individual class member claims until after a determination of class-wide liability. See, *e.g.*, *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 443 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 258 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379-1380 (5th Cir. 1974). *Accord: Robinson* v. *Lorillard Corp.*, 319 F. Supp. 835, 843 (M.D. N.C. 1970), *aff'd* 444 F.2d 791, 803 n.17 4th Cir. 1970); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 878 (6th Cir. 1973).

bers' rights, see Advisory Committee's Note, 39 F.R.D. 69, 106-107 (1966).[6]

2. The Decision Below Does Not Offend the Policy of Encouraging Conciliation of Title VII Claims.

Petitioner next asserts that the decision below conflicts with the Congressional policy of providing an opportunity to conciliate Title VII claims short of litigation (Pet. 8-9). This contention too is superficial.

Congress did intend, in enacting Title VII, to provide an opportunity for the informal resolution of complaints through conciliation, *Alexander* v. *Gardner-Denver Co.*, 39 L.Ed.2d 147, 156 (1974).[7] This Congressional policy is fulfilled by requiring that the substance of the litigated class claim must first be presented to EEOC in a timely charge on which EEOC may then undertake conciliation efforts. The scope of Title VII class action litigation is limited to matters "like or related to" the EEOC charge, which EEOC could, therefore, have investigated and conciliated.[8]

The filing of a single EEOC charge by one representative class member puts the charged respondent on notice

---

[6] The same procedure has been approved in *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 257; *Rosen* v. *Public Service Electric & Gas Co.*, *supra*, 477 F.2d at 96 n.17; and *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1972). See also *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441, 448 (5th Cir. 1973).

[7] But Congress did not demand actual conciliation efforts as a prerequisite to suit; it only required an opportunity for the administrative machinery of EEOC to resolve the dispute informally. *E.g.*, *Dent* v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 402-403 (5th Cir. 1969); *Miller* v. *International Paper Co.*, 408 F.2d 283, 290-291 (5th Cir. 1969).

[8] *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970); *Tipler* v. *E. I. DuPont Co.*, 443 F.2d 125, 131 (6th Cir. 1971).

and gives EEOC administrative authority as to all class claims "like or related to" that of the charging party. Therefore, a proper EEOC charge raising or leading to the class issues provides an adequate foundation for including other persons within the class affected by the discriminatory practices in the litigation as class members or even as co-plaintiffs.[9] The class approach in no way diminishes the opportunity for an employer truly interested in conciliation of valid charges to resolve the matter with the charging parties through the offices of EEOC.[10]

It is the contrary rule urged by Petitioner, requiring filing of each similar claim individually, that would in truth frustrate the goal of conciliation. Freed of the prospect of effective assertion of class-wide claims, discriminatory employers like Petitioner would have no reason or incentive to conciliate their broad or systemic practices of discrimination against members of a protected class. Congress intended Title VII to be an *effective* remedy for deeply entrenched practices of employment discrimination, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971); *Alexander* v. *Gardner-Denver Co.*, *supra*. To adopt Petitioner's position would, more than any other ruling imaginable, extinguish Title VII as a beacon of significant "voluntary" reform.

---

[9] The Fifth Circuit held in the leading decision on this subject, *Oatis* v. *Crown-Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968):

> Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEQC, filed against the same employer, as a prerequisite to relief through resort to the court would frustrate our system of justice and order.

Accord: Bowe v. *Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969).

[10] There is some irony in Petitioner's last-minute embrace of the conciliation principle. See n. 1, *supra*.

The class back pay award rests on an independent adequate basis in 42 U.S.C. § 1981, without regard to Petitioner's arguments directed to Title VII's pre-suit procedural requirements or conciliation policy.[11] In order to avoid affirmance on this basis, Petitioner unpersuasively urges that § 1981, which the appellate courts have uniformly held applicable to private employment discrimination,[12] was pre-empted by enactment of Title VII (Pet. 9). This contention squarely contradicts (without citing) all the cases cited in n.12, *infra*, as well as this Court's decision last term in *Alexander* v. *Gardner-Denver Co.*, *supra*. There the Court pointed out in broad language that Title VII complements other available remedies for employment discrimination, but does not replace them, and specifically noted § 1981, 39 L.Ed.2d at 158 n.7.

[11] The decision below apparently considered §1981 an equally valid basis for its class back pay holding (A57).

[12] See, *e.g.*, *Gresham* v. *Chambers*, —— F.2d ——, 8 EPD ¶9613 (2nd Cir. 1974); *Young* v. *International Tel. & Tel. Co.*, 438 F.2d 757 (3rd Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied* 409 U.S. 982 (1972); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied* 401 U.S. 948 (1971); *Caldwell* v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971); *Long* v. *Ford Motor Co.*, 496 F.2d 500, 503 (6th Cir. 1974); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476 (7th Cir. 1971), *cert. denied* 400 U.S. 911 (1970); *Brady* v. *Bristol-Myers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Macklin* v. *Spector Freight System, Inc.*, 478 F.2d 979, 993-994 (D.C. Cir. 1973).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN R. MYER
Crosland, Myer & Rindskopf
2415 Nat'l Bank of Georgia Bldg.
34 Peachtree Street, N.W.
Atlanta, Georgia 30303

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
BARRY L. GOLDSTEIN
10 Columbus Circle, Suite 2030
New York, New York 10019

ELIZABETH R. RINDSKOPF
265 Church Street
New Haven, Connecticut 06510

Attorneys for Respondents